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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JESUS G.,)
)
Appellant,)
)
v.)
)
ARIZONA DEPARTMENT OF)
ECONOMIC SECURITY and)
SEBASTIAN D.,)
)
Appellees.)
_____)

2 CA-JV 2009-0050
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18279700

Honorable Charles S. Sabalos, Judge

AFFIRMED

Sarah Michèle Martin

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Attorney for Appellant

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By Dawn R. Williams

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Department of Economic Security

H O W A R D, Chief Judge.

¶1 Appellant Jesus G. appeals from the juvenile court's May 2009 order terminating his parental rights to his son Sebastian D., born in November 1997, on the ground that the child had been out of the home pursuant to a court order for fifteen months or longer and Jesus had failed to remedy the circumstances that caused Sebastian to remain out of the home. *See* A.R.S. § 8-533(B)(8)(c). Jesus challenges the sufficiency of the evidence to support the findings the court made pursuant to this subsection of the statute. He also contends the court's order terminating his rights does not include sufficient findings of fact. We affirm for the reasons stated below.

¶2 In June 2007, Child Protective Services (CPS) removed Sebastian and his siblings Madeline and Jasmine, also Jesus's children, from the home in which they had been living with their mother because of neglect, the parents' substance abuse, and domestic violence between the mother and Jesus. By that time, Sebastian had missed about one hundred days of school and was acting out in a variety of ways, including sexually. CPS had been involved with the family since January. Jesus and the children's mother had been separated for a number of months by the time the children were removed from the home. The children were adjudicated dependent as to both parents.¹ Jesus admitted allegations in an amended dependency petition, including the following: he had used cocaine and methamphetamine and had not been treated for his substance abuse problem until April 2007;

¹Both parents' rights to Sebastian were ultimately terminated; neither the siblings nor the mother are parties to this appeal.

he had a history of criminal activity; and he had engaged in domestic violence involving the children's mother in front of the children.

¶3 The initial case plan was reunification of the family. After a permanency hearing in June 2008, the juvenile court found ADES had “made reasonable efforts to achieve the permanency goal of family reunification by offering” the parents a panoply of services. The court further found the parents were “in substantial compliance with the case plan and ha[d] made efforts in remedying the circumstances that cause[d] the children to be in an out-of-home placement.” But, the court added, the children could not “be returned to either parent without a substantial risk of harm to their mental, physical or emotional health and safety.” The court gave the parents additional time “to prove that they [could] fully remedy the circumstances that cause[d] the children to be dependent and in out-of-home placement.”

¶4 In January 2009, the juvenile court found Jesus was not fully compliant with the case plan and changed the case plan goal to severance and adoption, directing the Arizona Department of Economic Security (ADES) to file a motion to terminate the parents' parental rights to the children. ADES's subsequently filed motion sought to terminate his parental rights to Sebastian based on the length of time in care. *See* § 8-533(B)(8)(c). After a contested hearing, the court found ADES had sustained its burden of proving with clear and convincing evidence the elements of § 8-533(B)(8)(c), which the court articulated, and by a preponderance of the evidence that termination of Jesus's parental rights was in the children's best interests. *See Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, ¶ 1, 198

P.3d 1203, 1204 (2009) (“[P]arental rights may be terminated if clear and convincing evidence establishes a statutorily identified ground . . . and a preponderance of the evidence shows that termination is in the child’s best interests.”). This appeal followed.

¶5 Before terminating Jesus’s rights pursuant to § 8-533(B)(8)(c), the juvenile court was required to find Sebastian had been out of the home pursuant to a court order for “fifteen months or longer,” Jesus had “been unable to remedy the circumstances that cause[d] [Sebastian] to be in an out-of-home placement[,] and there is a substantial likelihood that [Jesus] will not be capable of exercising proper and effective parental care and control in the near future.” The court was also required to find ADES had “made a diligent effort to provide [Sebastian with] appropriate reunification services” § 8-533(B)(8); *see also Mary Ellen C. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 185, ¶¶ 1, 33, 971 P.2d 1046, 1047, 1053 (App. 1999); § 8-533(D) (requiring court to consider whether ADES had made “reunification services” available to parent and parent’s “participation . . . in these services” before terminating parent’s rights on various grounds including length of time in care).

¶6 After a three-day hearing, the juvenile court entered a thorough minute entry in which it summarized a substantial portion of the evidence presented and made the requisite findings pursuant to A.R.S. § 538(A). The court pointed to the testimony of Letha Grady, Sebastian’s individual counselor, that Sebastian had been traumatized by his parents’ behavior, particularly the domestic violence that had taken place in the home and in his presence. Sebastian engaged in improper, sexualized behavior and used vulgar language, which Grady noted had increased after visits with the parents. Thus, as the court observed,

Grady believed that, despite the fact that the parents had complied with some of the requirements of the case plan, their “failure to demonstrate sobriety with some degree of certainty and to accept responsibility for causing damage to the child due to domestic violence renders them incapable of exercising proper and effective parental control in the near future.” Grady opined that, unless he could be cared for appropriately and consistently, Sebastian would remain “at risk for engaging in sex-related criminal conduct as he matures.”

¶7 The juvenile court also noted family therapist Jan Milligan, who had worked with the family since July 2008, testified Jesus had admitted to her he kept pornographic materials in the home, one of the other children had told her she and Sebastian had seen photographs of their mother engaging in oral sexual acts with Jesus, and the mother had told her Jesus “humped” her in front of Sebastian. The court summarized, too, the panoply of other services ADES had provided the parents. As the court noted, the CPS case manager testified the parents had received “group testing, psychological evaluation.” They received “random urinalysis testing, substance abuse counseling, individual counseling, anger management classes, parenting classes, domestic violence classes and supervised visitation.” The court also pointed out that the evidence established Jesus successfully had completed a domestic violence counseling program; participated in substance abuse group counseling; and received individual therapy designed to address a variety of issues, including the “physical and sexual abuse he suffered as a child, his anger management problem and his drug and alcohol abuse.” And, Jesus was evaluated by psychologist Philip Balch, who concluded Jesus likely was the victim of sexual and physical abuse as a child and suffers

from depressive disorder not otherwise specified, and personality disorder, also not otherwise specified, with antisocial, addictive, and narcissistic features, all of which “significantly affect his ability to safely parent [Sebastian] and will require long-term treatment.”

¶8 The juvenile court noted further that the parents had completed portions of the case plan, but as the case manager testified, “the parents failed to sufficiently benefit from these services and did not complete other requirements of the case plan.” The court gave specific examples, noting the testimony of CPS case manager Aurora Beltran and a report from April 2009 that the parents had not consistently submitted to drug testing according to the drug-testing protocol. Again the court noted both parents’ partial compliance with the case plan but pointed out that Beltran had concluded, “after nearly two years, the parents remain unable to provide the patient and intensive care which the child requires and which he continues to receive in the home of his relative adoptive placement.” Beltran believed, as the court pointed out, that, based on all of the circumstances, severance and adoption were in Sebastian’s best interests.

¶9 After reviewing the evidence, the juvenile court found ADES had proved by clear and convincing evidence the elements of § 8-533(B)(8)(c). The court added that,

despite CPS having made diligent efforts to provide appropriate reunification services, the parents have been unable to remedy the circumstances which cause the child to be in an out-of-home placement and there is a substantial likelihood that they will not be capable of exercising proper and effective parental care and control in the near future.

¶10 Jesus first challenges the sufficiency of the evidence to support the juvenile court’s finding that ADES had made diligent efforts to provide him with appropriate services

designed to reunify the family. He contends, inter alia, “the services were deficient because the complete absence of communication among service providers made what could have been effective and adequate assistance fall far below the constitutional requirement.” We view the evidence in the light most favorable to sustaining the court’s ruling, *Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005), and accept the court’s findings of fact as long as substantial evidence exists to support them, *Denise R. v. Ariz. Dep’t of Econ. Sec.*, 221 Ariz. 92, ¶ 4, 210 P.3d 1263, 1264 (App. 2009). As the trier of fact, the court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). We do not reweigh the evidence. See *Lashonda M.*, 210 Ariz. 77, ¶ 13, 107 P.3d at 927. Rather, we affirm the court’s order “unless we [can] say as a matter of law that no one could reasonably find the evidence [supporting statutory grounds for termination] to be clear and convincing.” *Denise R.*, 221 Ariz. 92, ¶ 10, 210 P.3d at 1266, quoting *Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955) (second alteration in *Denise R.*).

¶11 At the outset, we do not address Jesus’s argument that ADES failed to satisfy a “constitutional requirement,” as though a constitutionally based obligation to diligently provide appropriate reunification services differs from that imposed by the statute. First, it does not appear Jesus made this argument in the juvenile court. See *Christy C. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (“We generally do not consider [claims] raised for the first time on appeal.”). Second, Jesus has “not meaningfully

develop[ed] it in his opening brief.” *Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, n.8, 181 P.3d 1126, 1131 n.8 (App. 2008). We only address Jesus’s contention that there was insufficient evidence to support the court’s findings that mirrored the language of § 8-533(B)(8)(c).

¶12 The record supports the juvenile court’s extensive recitation of the evidence. That and other evidence presented at the severance hearing amply support the court’s finding that ADES had made diligent efforts to reunify Jesus with Sebastian by providing him with appropriate services. The evidence the court reviewed and relied on, as well as other evidence presented during the severance hearing, established Jesus had been provided an array of services that addressed his mental health problems and other issues, including his abuse of drugs and alcohol, inability to control his anger, and failure to understand the effect domestic violence in the home had on his children.

¶13 We reject Jesus’s contention that “the services were deficient because [of] the complete absence of communication among service providers” and because he allegedly did not receive “feedback.” Monthly meetings of the Child and Family Team (CFT) were held throughout most of the dependency. CFT facilitator Kelly Woofenden testified the CFT “is composed of the child, the family and anybody else who supports the family, as well as professionals that are serving the children in the team.” She explained the CFT “coordinates services for the children; monitors progress on those services; and helps in any other way of getting resources for the family,” albeit with the focus being primarily on the child, not the parent. Jesus attended only nine of the twenty CFT meetings, despite the fact that efforts

were made to accommodate his schedule by allowing him to appear telephonically. Moreover, as ADES points out, the record shows Jesus chose his own therapist through Las Familias. The caseworker had requested that this therapist provide written reports to the CFT or attend monthly CFT meetings, but she did not do so. And Woofenden stated that the parents were told it was their responsibility to make certain any service provider they believe would be helpful attended the meetings.

¶14 In any event, that Jesus’s therapist did not communicate and coordinate with other service providers or that there might have been ways in which the coordination of services to Jesus could have been improved generally does not negate the juvenile court’s finding that ADES had made a diligent effort to reunify Jesus with Sebastian. *See Mary Ellen C.*, 193 Ariz. 185, ¶¶ 34, 37, 971 P.2d at 1053, *quoting In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994) (ADES not required to “provide ‘every conceivable service’” or “rehabilitative measures that are futile” but only those with “reasonable prospect of success”). Nor has Jesus established how additional communication among providers would have changed the outcome here. Finally, the juvenile court had found throughout the dependency that ADES was making reasonable efforts to achieve the case plan goal of family reunification. It does not appear Jesus ever objected to those findings when made, nor did he appeal from the orders in which these findings were made.

¶15 Jesus also contends the evidence was not clear and convincing that he had been unable to remedy the circumstances that caused Sebastian to remain out of the home or that

there is a substantial likelihood Jesus would not be capable of exercising proper and effective parental care and control in the near future. Once again Jesus contends the lack of communication between service providers was a contributing factor. He relies on evidence that he participated in and benefitted from services to support his implication he would continue to do so. He also complains that much of Sebastian's inappropriate sexual behavior was attributable to the mother, not Jesus, and occurred during her visits with Sebastian. He seems to be suggesting he was unfairly held responsible for that behavior because it was a basis for the court's conclusion that Sebastian could not be placed with either parent and that Jesus, like the mother, would not be able to effectively parent the child.

¶16 The record contains ample evidence Jesus was told specifically what the requirements of the case plan were and precisely what was expected of him. He was given a detailed case plan, substance abuse treatment, counseling for domestic violence, and individual therapy, all of which were provided to address specific problems that affected his ability to parent his children. The evidence established, too, that, although Jesus participated in and benefitted from the services, the juvenile court did not abuse its discretion in concluding that, ultimately, Jesus was not able to change the circumstances that caused Sebastian to remain in court-ordered care. Jesus did not comply entirely with the drug-testing protocol, which was crucial to ADES's determination of whether he maintained sobriety and could provide a safe home for his children, and he prematurely discontinued individual therapy in February 2008. The record as a whole established drug and alcohol abuse had contributed to Jesus's inability to manage his anger and to the occurrence of domestic

violence in the home; therefore, it was crucial that Jesus maintain sobriety in order to be able to adequately parent his children and provide them with a safe, functional home. Family therapist Jan Milligan testified that Jesus had progressed and had done everything she had directed him to do to improve his parenting skills. But she also stated that, in her opinion, termination of both parents' rights was in the children's best interests because it was "too late" in the process; the parents simply had not "work[ed] through" the various issues, and no one yet had been able to determine what had "happened to damage the children so much" and why they act out inappropriately.

¶17 Demonstrating poor judgment as recently as March 2009, Jesus had threatened to spank Madeline, which Grady viewed as illustrative of Jesus's failure to understand the depth of damage suffered by the children and that physical discipline was inappropriate for a child who had been traumatized by violence. There was ample evidence that the trauma Sebastian had suffered was deep and would require a stable, sober, predictable parent, one in control of his or her anger. There was more than reasonable evidence that, despite his progress, Jesus would not be able to adequately parent Sebastian in the near future.

¶18 Jesus's final argument is that the juvenile court did "not make sufficient findings to satisfy the statutory and constitutional requirements necessary for an order of termination." We disagree. The court's order is thorough and contains the requisite findings of fact and conclusions of law under § 8-538(A). That the court summarized portions of the evidence presented during the three-day hearing does not mean, as Jesus suggests, it failed to make actual findings of fact. Rather, the court began the minute entry by stating that it had

considered “all of the evidence, including the testimony of witnesses and their credibility and demeanor while testifying,” based on which the court “finds and rules as follows” Viewed within the context of this introduction and considered together with findings throughout the order, the witnesses’ testimony was believed by the court and provided the court with the basis for its conclusion that ADES had sustained its burden of proving the allegations in the motion to terminate Jesus’s parental rights to Sebastian.

¶19 Jesus’s complaint, raised for the first time on appeal, that the juvenile court should have included more details in the order has been waived by his failure to bring the matter to the attention of the court so that it could make additional findings. *See Christy C.*, 214 Ariz. 445, ¶ 21, 153 P.3d at 1081. Additionally, any separate argument that the court violated Jesus’s constitutional rights by not making more detailed findings was neither raised below nor adequately developed on appeal.

¶20 For the reasons stated, we affirm the juvenile court’s May 11, 2009 order terminating Jesus’s parental rights to Sebastian.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge